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Modification of the Competencesincumbent on the Court of Auditors in regard to the Regulation Authorities – Limitation of the Supreme Audit Institution's Authority or the Observance of the EU Law?

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Abstract: This study attempts in its first part an analysisof the competences incumbent on the Court of Auditors.The analysis shall start for the general competences of the audit institutionprovided in the normative deeds regulating its activity. In the second part, the study shall analyze the competences of the Court of Auditors in regard to the regulation authorities. We proposed ourselves this analysis having regard to the EU law that regulates the obligation of members states to warrant the functional and decisional independence of the regulation authorities corroborated with the legal amendments brought to the normative deeds from the domestic law on the organization and operation of such authorities, by limiting the competences of the Court of Auditors only on performing the financial audit.

Keywords: performance audit; financial audit; regulation; independence; directive

1. Introduction

The study aims at analyzing the competences of the Court of Auditors, as such are regulated by Law no. 94/1992 on the organization and functioning of the Court of Auditors[2] and the Regulation on the organization and performance of activities specific to the Court of Auditors (RODAS), as well as the capitalization of the deeds resulting from these activities, approved by the Decision of the Plenum of the Court of Auditors no. 155/2014[3], by reference to the legal amendments brought

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[2] Republished in the Official Gazette of Romania, Part I, no. 238 from 3 April 2014;
[3] Publishedin the Official Gazette of Romania, Part I, no. 547/24 July 2014; previously was been in force the Regulation approved by the Decision of the Plenum of the Court of Auditors no. 130/2010, published in theOfficial Gazette of Romania, Part I, no. 832 from 13 December 2010.

to the normative deeds regarding the organization and operation of some of the regulation authorities. The analysis is of interest having regard to the fact that further to the appearance of the normative deeds through which these amendments were made, the competences of the auditors from the Court of Auditors were limited only to the financial audit of the regulation authorities, excluding the regulation activity from the control of the audit institution.

The analysis shall consider the organizational, functional, but especially decisional independence status imposes to the Member States of the European Union in regard to the regulation authorities.

The study is particularly relevant in view of the fact that in recent years the Court of Auditors has ignored the EU law by conducting performance audits on the regulatory activity of the aboveauthorities.

I chose for this study three of the Romanian regulation authorities, i.e. the National Regulatory Authority for Energy, the Financial Supervisory Authority and the National Authority for Administration and Regulation in Communications, considering that the Romanian lawmaker had a different approach in regard to the limitation of the powers of the auditors from the Court of Auditors in carrying out the performance audit at these institutions.

2. General Considerations Regarding the Competences of the Court Of Auditors

According to the Constitution of Romania[1]and Law no.94/1992, the Court of Auditorsexerts the control upon the manner of setting up, managing and using the financial resources of the state and of the public sector, representing the supreme audit body of public money in Romania[2].

In accordance with the provisions from art. 21 para. (1) from Law no. 94/1992, "*The Court of Auditorsexerts the control function uponthe manner of setting up, managing and using the financial resources of the State and of the public sector, supplying to the Parliament and the territorial administrative units respectively*

[1] Art. 140 from the Constitution of Romania, amended and supplemented by the Law on the reviewing of the Constitution of Romania, Part I, no. 758 from 29 October 2003, republished by the Legislative Council, by virtue of art. 152 from the Constitution, by re-updating the names and rendering a new numbering to the texts;

[2] Virginia Vedinaș, *The part of the Court of Auditorsin the consolidation of the constitutional state in Romania*, in the magazine The Court of Auditors of Romania, no. 17/2017, p. 30.

reports on the use and management thereof, in accordance with the principles of legality, regularity, cost-effectiveness, efficiency and efficacy", and according topara.(2) "*The Court of Auditorsmay exert the performance audit upon the management of the consolidated general budget, as well as upon any public funds*". Thus result the two types of audits from the competence sphere of the Court of Auditors: **financial audit**[1] **and performance audit**[2]**.**

If in regard to the financial audit there are no divergent opinions regarding the limits on the control of theCourt of Auditors and the lawmaker limited himself to mentioning the types of execution accounts upon which the audit institution performs this type of audit, in regard to the performance audit, art. 28 from Law no.94/1992 provides that "*(1) The Court of Auditorsmakes the performance auditon using the financial resources of the state and of the public sector. (2) The Court of Auditorsperforms an independent assessment upon the economicefficiency, the yield and efficacy by which a public entity, a program, aproject, aprocessor an activity uses the public resources assigned to fulfil the established objectives".*

The performance audit represents *"areporting of the manner in which the programs or activities are performed in all states of their development. The measurement of the performance is based on examining the manner in which aprogram accomplished its objectives or requirements by permanently referring to the established performance standards".*[3]

A certain generality and lack of forecast of the legal norm can be noticed from the wording of the legal text – an issue that generated several disputes regarding the limits in which auditors of the Court may perform this type of audit. Disputes occurred, particularly in the special case of regulation authorities, in regard to which the EU law imposed a functional and decisional independence, an independence the violation of which has as a consequence the triggering of the infringement procedure by the EuropeanCommission against the concerned state.

[1] Art. 2 lit.c) from Law no. 94/1992 defines the financial audit as being the "*the activity by which is monitored whether the financial statements are complete, real and compliant with the applicable laws and regulations, supplying an opinion for such purpose*";

[2] Art. 2 lit.d) from Law no. 94/1992 defines the performance audit as being "*an independent assessment of the manner in which an entity, a program, an activity or an operation is functioning in view of the yield, economic efficiency and efficacy*".

[3] *APPLYING THE PERFORMANCE AUDIT TO A PUBLIC ENTITIES SUPPLYING PUBLIC SERVICES –PhD CandidateCibu (Jeflea) Dochița - ValahiaUniversity from Targoviste, http://www.oeconomica.uab.ro/upload/lucrari/820061/5.pdf.*

3. The Special Status of the Regulation Authorities Imposed by the Community Law

3.1. Directive – mandatory deed for the Member States of the European Union

According to article 288 from the Treaty on the Functioning of the European Union (TFUE), the directiveis mandatory for each receiving Member Statein regard to the result that has to be accomplished, leaving to the national authorities the competence in regard to the form and means to reach the result. Essentially, the directives mainly supposes the intervention of the national authorities, so that it should have legal effects in the domestic law of each receiving Member State. Born out of the process of Community decision, the correctly published or notified directive creates as a liability of the receiving Member State an obligation to take the necessary measure in order to effectively apply such in the national legal order. The obligation directly derives from the exigency imposed by art. 288 TFUE.

The application of the directive is the operation by which the Member State receiving a European Directive proceeds to adopt the measures necessary to implement such. The State chooses the "form" (in view of legal or statutory techniquecharacteristic to each State) and the "means" (legal institutionssusceptibleto accomplish the indicated objective) and it is essential that such should lead to the accomplishment of the result. Union law provides that the result required by a directive be achieved *de legem* and *de facto*, since the legal interpretation and actual application of the rules are, as a rule, decisive in determining whether a Member State has correctly transposed a directive[1]**.**The implementation has to take place within the deadline set at the time of adopting the Directive (generally within two years). According to art. 17 para. (1) of the Treaty on European Union, the European Commission aims to ensure the application of the Treaties by the ratifying States, the measures adopted by the institutions to that end and also oversees the application of EU law under the control of the Court of Justice of the European Union. If the concerned Member State does not communicate measures fully transposing the provisions of the directives or fails to

[1] See the Decision from 29 May 1997, Commission/UK Unit, C-300/95, Rec., p. I-2649 C-300/95 in which the Court found that, although the article from the transposing law could have entered into conflict with a provision expressly comprised in a directive, the same transposition law required from the courts to apply an interpretation consistent with that article for transposition with the aim and effect of the Directive, points 37 - 39 and the judgment from 8 June 1994, /UK, C-382/92, Rec., p. I-2435, point 36.

take action to remove the suspicion that EU law has been infringed, the Commission may initiate a formal procedure to assess the default - infringement. The procedure follows a series of stages provided for in the EU Treaties, each of which ends with an official decision

3.2. The Special Status of the Regulation Authorities Imposed by the European Union Law; the Transposition of Directives and New Legislative Amendments in Domestic Law

As I mentioned in the past, I chose for this study 3 of the regulation authorities, all of them having the same status of functional and decisional independence, imposed by European directives that have been transposed into domestic law.

a) The Financial Supervision Authority(ASF)

According to the provisions of Article 1 from Emergency Ordinance of the Government no. 93/2012 on setting up, organizing and functioning of the Financial Supervisory Authority ”The Financial Supervision, hereinafter called A.S.F., is established as an autonomous, specialized legal entity, which isindependent, self-financed, exerting its attributions according to the provisions from this Emergency Ordinance, by taking over and reorganizing all attributions and prerogatives of the National Security Commission (C.N.V.M.), he Insurance Supervisory Commission (C.S.A.) and the Supervision Commission of the Private Pension System (C.S.S.P.P.).”

In European law we find, for the first time, the references to the independence of the regulation authority, at point 36 of the Preamble to Directive 2003/6/EC of the European Parliament and of the Council from 28 January 2003 on abusive usesof the confidential information and market manipulation, subsequent amendments and supplements, according to which “Each Member State should designate a single competent authority to assume at least final responsibility for monitoring compliance with the provisions adopted pursuant to this Directive and for international cooperation. The Authority should be of an administrative nature in order to guarantee its independence”.

In regard to ASF, we can claim that the Romanian lawmaker managed to align the domestic legislation to the EU law by transposing Directives into domestic law and by aligning such to the Regulations issued by the European institutions. Besides, neither in regard to the competences of the Court of Auditorsof verifying the regulatory activity of ASF, the Romanian lawmaker has not hesitated too much, Emergency Ordinance of the Government no. 93/2012 being amended in the year

2015 , i.e. a new article was inserted - art. 21^1, according to which "The execution of the income and expense budget of A.S.F. is subject to the control of the Court of Auditors of Romania". Thus, it can be noticed that Parliament understood that the independence of the regulatory authority would be affected if the Court of Auditors could carry out any kind of control, including an audit of the performance of regulatory activity.

b) Romanian Energy Regulatory Authority (ANRE)

If in regard to ASF, the legal procedure followed a natural, normal evolution, in which the Romanian lawmaker understood the notion of "independence" of the regulation authority, the situation of the regulation authority was not the same in the field of energy and natural gases.

Emergency Ordinance of the Government no.33/2007 on organizing and operating the Romanian Energy Regulatory Authority[1], as approved with amendments and supplementations by Law no.160/2012, which provides in art. 1 that "*The Romanian Energy Regulatory Authority, hereinafter called ANRE, is an autonomous administrative authority, with legal status, under the control of the Parliament, fully financed out of own incomes,* ***independent in decisional, organisational and functional view,****having as a subject matter the drafting, approval and monitoring of applying the aggregate of mandatory regulations at national level necessary for the functioning of the sector and the market of electricity, thermal power and natural gases in conditions of efficiency, competition, transparency and consumer protection*" had a difficult legal evolution.

The drafting and adoption of the Law on approving Emergency Ordinance of the Government no. 33/3007 – Law no. 160/2012, was part of a long and laborious project to transpose legal package III – Energy, which also was the subject matter of an infringement procedure against Romania (triggered in the year 2009), a project in which the European Commission asked Romania expressly thatANRE should be a distinct entity in legal view and independent in function view from any other entity (…) that has separate budgetary allowances with autonomy in the

[1] Approved with amendments and supplementations by Law no. 160/2012 for the approval ofr. art. I from Emergency Ordinance of the Government no. 33/2007on the amendment and supplementation of the Electricity Law no. 13/2007 and Gas Law no. 351/2004, published in the Official Gazette of Romania, Part I, no.685/3 October 2012.

execution of the assigned budget and which disposes of the human and financial resources necessary to fulfil the tasks[1].

In particular, the provisions of the European directives ignored by the Romanian lawmaker were the following: art. 35 from Directive 72 on the *Designation and Independence of Regulatory Authorities*, Art. 39 respectively from Directive 73 on the *Designation of Regulatory Authorities and the Independency thereof*: "*Member States shall warrant the independence of the regulatory authorities and ensure that they impartially and transparently exercise their powers. For such purpose, the Member State shall ensure that, when carrying out its regulatory tasks under this Directive and the legislation in the field, the regulatory authority: (a) is legally distinct and independent infunctional view from any other public or private entity; (b) ensure that its staff and senior management: (i) act independently from any market interest; and (ii) does not request or accept direct instructions from any government or from any public or private entity in the exercise of the regulatory powers incumbent on it."* Concurrently,*"**in order to protect the independence of regulatory authorities, Member States shall ensure in particular that (a) the regulatory authority can take autonomous decisions,** independently from any other political body, has separate annual budgetary allocations with autonomy in the implementation of the assigned budget and of the human and financial resources necessary for the performance of its duties (...)*"

Moreover, the European Commission in the *Interpretative Note on the application of the provisions on the regulatory authorities*, provided in Directives 2009/72/EC and 2009/73/EC, explains and details, in order to facilitate an as fair as possible transposition thereofin the national legislations of the Member States, the functional independence criterion, as follows: "*The independence of regulation authorities is related, in accordance with the provisions of the new directives, not only to the interests of the electricity and gas industry but also, in addition to the relevant directives from 2003, to any other public institution (including national, local or regional government, municipalities, organizations or political structures) or private institutions. Furthermore, any hierarchical link between regulatory authorities and any other institution or body is not compatible with the requirements of independence laid down by the Community lawmakers*".

Although the provisions of both European and national legislation (following the transposition of the two Directives) expressly provide for ANRE's functional and

[1] Infogram of the European Commission no. 7330/05.10.2010.

decision-making independence, the Authority has in recent years received a "visit" from the auditors of the Court of Auditors, having as topic the performance audit. Such a situation happened in 2015, when the audit by the Court of Auditors had as its theme "*The Performance Audit of the Electricity Market 2010-2014*". It can be assessed from the document[1]issued by the auditors from the Court of Auditorsthat they have actually verified the regulatory activity of ANRE, which obviously leads to the impairment of the functional independence, but especially of the lawmaker's decision-making. In fact, the practice of courts has the same purpose. Thus, in a decision of the High Court of Cassation and Justice concerning the application for annulment of the administrative acts issued by the Court of Auditors, it was stated that "*the specific provisions of EOG no.33/2007 on the operation of ANRE and Art. 35 of Directive 72 on the Designation and Independence of Regulatory Authorities, respectively art. 39 of Directive 73 on the Designation of Regulators and Their Independence are applicable to this case (...)The defendant-respondent (the Court of Auditors), without considering the infringement procedure triggered by the European Commission, to affect ANRE's independence*.[2] "Thus, it can be noted that the supreme court has ruled on the need to remove from the competence sphere of auditors from the Court of Auditors the verification of the regulatory activity of ANRE.

Almost ten years after the first notice from the European Commission on the need to fully respect the independence of the regulatory authority, the lawmaker understood the need to expressly limit the powers of the Court of Auditors, and only to conduct the financial audit in regard to ANRE,. Thus, 3 years after the amendment of the ASF legislation, appeared Law no. 1/2018 amending and supplementing Emergency Ordinance of the Government no. 33/2007 on the organization and functioning of the Romanian Energy Regulatory Authority[3], ordering in the sole article, point 2:" *In Article 2, after paragraph (7), a new paragraph (8) shall be inserted, with the following wording: "(8)* ***The ANRE activity of ANRE shall be audited by the Romanian Court of Auditors only on the economic and financial operations performed by*** *ANRE , which is reflected in the income and expense budget and in the annual accounts»".*

Surprisingly, however, the Court of Auditors triggered a new action with the Regulatory Authority on "*The Performance Audit of the Natural Gas Market in*

[1] http://www.curteadeconturi.ro/Publicatii/SINTEZA_piata_energie.pdf.
[2] Civil Decision no. 3354/16 October 2018, the High Court of Cassation and Justice, Administrative and Tax Contentious Section.
[3] Published in the Official Gazette of Romania, Part I, no. 8 from 4 January 2018.

Romania" concluded with the July 2019 release of the Report[1]. Without being subjected to the analysis of the present study, we are only surprised at the attitude of the Romanian supreme audit institution (which cannot invoke a possible lack of knowledge of the law), triggered and carried out a performance audit mission, in the conditions in which there is no legal basis.

c) National Authority for Administration and Regulation in Communications (ANCOM)

The third Regulatory Authority elected for this study is ANCOM, and the reason for choosing this approach is that, for the moment, the lawmaker is currently silent in its regard, and the Court of Auditors (still) has the power to carry out performance audit.

It is worth mentioning that as early as the preamble to Emergency Ordinance of the Government Ordinance no. 22 from 11 March 2009[2] regarding the setting up of the National Authority for Administration and Regulation in Communication, it is mentioned that "*Taking into account that in the letter of formal notice of 29 January 2009 (Case No 2008/2.366) the European Commission draws attention to the fact that the provisions of Directive 2002/21/EC*[3]*on a common regulatory framework for electronic communications networks and services (Framework Directive), given that the Government of Romania is invited to respond to the letter of formal notice within the framework of the action triggered on 2 April 2009 and, in these conditions and the elaboration of a normative act that will establish the incorporation, organization and functioning of the regulatory authority in the field of electronic communications under the control of the Parliament is a solution that will bring institutional stability to the national regulatory authority in the field of electronic communications, the adoption of the normative deed draft being concurrently able to create the premises for the closure of the infringement procedure before the next phase of this procedure, taking into account the actions launched at European Commission level* ***to ensure the stability and independence of the regulation authority****in the field of electronic communications (principles regardedalso by the need to ensure impartiality in regulating decision-making by the authority), the only way to end the infringement proceedings is to adopt, as a*

[1] http://www.curteadeconturi.ro/Publicatii/SintezaDepIV_08072019.pdf.
[2] Published in the Official Gazette of Romania, Part I, no. 174 from 19 March 2009.
[3] Art. 3, para. (2) from the Directiveprovides that "*Member States shall guarantee the independence of the national regulatory authorities by ensuring that they are legally distinct and independent*".

matter of urgency, a normative act laying down new principles on the status, organization and functioning of the regulator in the field".

Although, according to art. 1 of Government Emergency Ordinance no. 22/2009 "*The National Authority for Administration and Regulation in Communications, hereinafter referred to as ANCOM, as an* ***autonomous*** *public authority with legal personality, under parliamentary control, financed entirely from own revenues*", was established in the year 2015, the auditors from the Court of Auditors conducted a performance audit mission on the project "*Universal Service in the Electronic Communications Sector"* in the context of the strategy set out in the "*Policy and Strategy Paper on the Implementation of the Universal Service in the Electronic Communications Sector"*for the period 2004 - 2014[1]. Thus, it can be noted that although there was an infringement procedure initiated by the European Commission following the violation of ANCOM's independence by the Romanian state, the lawmaker nevertheless allowed the Court of Auditors to verify the regulatory activity.

4. Conclusion

From the analysis of the situation of the three regulatory authorities, one can notice the differential treatment that the lawmaker chose in regard to the powers of the Court of Auditors to perform the performance audit at this type of public institutions. Because, in fact, what is the audit performance carried out by the supreme audit institution? This type of audit checks the way the institution carries out its regulatory activity (in terms of yield, effectiveness and economic efficiency). However, this kind of interference in the independence of regulators was sanctioned by the European Commission.

The statute of regulatory authorities, which should enjoy functional and decision-making independence, is indisputable, in order to be able to carry out its specific activities in the field it is supposed to regulate.

Nevertheless, the manner in which the Romanian lawmaker chose to manage the situation of each of the three regulatory authorities elected for this study is surprising. If in regard to ASF, the Court of Auditors' competences were limited only to carrying out the financial audit as early as 2015, with in regard to ANRE, the modification came later, at a distance of 3 years.

[1] http://www.curteadeconturi.ro/Publicatii/Sinteza_RA_ANCOM_2015.pdf.

However, the question remains what the lawmaker will do in regard to ANCOM, as the performance audit of the Court of Auditors is an interference with the regulatory activity, which is contrary to Community law and which is the reason for the two infringement proceedings I have referred in this study.

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